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Supreme Court of the United States

OCTOBER TERM, 1960

No. 377

CHISHOLM-MOORE HOIST CORPORATION,

Petitioner,

against

WILLIAM CARLSON,

Respondent.

PETITIONER'S REPLY BRIEF

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The Petitioner, in an apparent effort to bespeak sympathetic consideration for the admission of the type of testimony given by the expert, makes the following statement at page 13 of his brief:

> "Petitioner had the involved hoist in its possession or in sympathetic hands from the accident date until trial. Respondent could not obtain it nor did petitioner offer it in evidence".

The statement is in direct contradiction of the facts in the case. The hoist was in the possession of the superintendent of construction, a co-employee of the plaintiff, from April 20, 1950, the date of the accident, to April 25, 1950, when it was sent out by the plaintiff's employer to be tested by an independent engineer (40a, 43a, 44a). The hoist was not sent to the defendant manufacturer until December 1950 (48a). In the interval it remained in the

hands of the plaintiff's employer or the plaintiff's co-employees, hands which scarcely can be classified as "sympathetic" to the defendant manufacturer. The employer was subject to the provisions of the Workmen's Compensation Act of the State of Texas and its financial interest would lie in promoting the successful prosecution of a third-party action which would relieve it of its obligations under the Act.

When the hoist was examined by the manufacturer and found to be in satisfactory working condition, it was returned to its owner (51a). What happened to it after it was returned to its owner does not appear in the record, but there certainly is no basis for the statement that it was under the control of the defendant, or available to the defendant, at the time of trial. It might be pointed out that the Court of Appeals, in its opinion, assumed that the hoist was under the control of the defendant at the time of trial. The opinion states:

> "Insofar as defendant's objection and motion to strike were based on a theory that the testimony was irrelevant in the absence of evidence that the nut in fact was loose, they were properly overruled; particularly when a plaintiff is claiming a defect in an article manufactured by defendant and under defendant's control at the time of trial, plaintiff may show possible as well as actual defects." (Appendix A, p. 26)

Apart from the bald statement in the plaintiff's brief, there is nothing in the record that even remotely suggests that the hoist was under the control of the manufacturer at the time of the trial or at any time after the manufacturer had concluded its inspection. The plain fact is that the hoist was in the hands of its owner, who was the plaintiff's employer, at all times except for the period when it was returned to the factory for inspection.

The accident happened in an area where the only persons present were co-employees of the plaintiff. They were the

ones who knew what happened and how it happened. Long afterwards the manufacturer was called upon to explain an accident of which it had no knowledge and which, so far as all of its expert knowledge of its machines was concerned, could not and did not happen. In such circumstances there seems to be no reason to relax the rules governing the admission of evidence in favor of the plaintiff whose strategic position with respect to knowledge of the manner and cause of the accident was much more favorable than that of the defendant.

Respectfully submitted,

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